

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1128

B
P/S

To be argued by
ARMENDE LESSER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

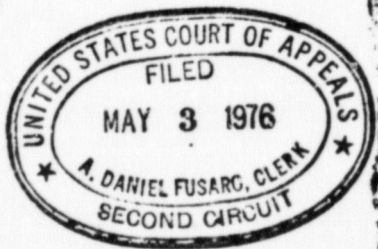
Appellant,

-against-

MARIO GIGANTE, JOSEPH SARCINELLA, JOSEPH
DENTI, VITO DI SALVO, DIEGO ASARO, ANGELO
NOCE, DAVY TREGCAGNOLI, ALFRED BONFIGLIO,
LEON BRODERSON, THOMAS VILLANOVA, MILTON
WEKAR, VINCENT LANDOLFI, JOSEPH FALCO,
BENJAMIN RAUGI, FRANK FORMOSA, DANNY
CILENTI, JOSEPH PALERMO, GERALD GIANGREGORIO,
NICHOLAS LONGO and PETER PELUSO,

Defendant-Appellees.
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BRIEF FOR DEFENDANT-APPELLEE VINCENT LANDOLFI



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BRIEF FOR DEFENDANT-APPELLEE VINCENT LANDOLFI

Preliminary Statement

The United States of America appeals from an order of the Honorable P. Griesa, United States District Judge entered in the United States District Court for the Southern District of New York on February 2, 1976, granting the motion, inter alia, of Vincent Landolfi, defendant-appellee herein, to suppress the Government's wire tap evidence obtained under order of Judge Tyler,

dated February 7, 1973 (Tr. A-44) and Judge Ward, dated March 3, 1973 (Tr. A-49).

Sealing orders pursuant to statutory requirement (18 USC 2518 [8][a]) were issued by Judge Tyler on January 7, 1974 pertaining to the order of February 7, 1973 which expired on February 22, 1973 (Tr. A-75) and by Judge Ward on January 7, 1974 pertaining to order of March 3, 1974 which expired on March 22, 1973 (Tr. A-81). The District Court found that the Government offered "no evidence of any excuse whatever regarding the reason why there was a delay of several months, and in some cases more than a year,* before the tapes were taken to the issuing judge for a sealing order under Section 8(a)" (Tr. A-4, 11. 15-19).

Statement of Facts

The facts applicable to this appellee's case are fully and fairly set forth in appellant's brief and need not be repeated here.

The statutory requirement provides for sealing orders "immediately upon the expiration of the period of the order, or extensions thereof" [Section 2518(8)(a)].

*eleven months' and ten months' delay respectively.

At a pre-trial hearing held on February 2, 1976 the Government placed in evidence the wire tap orders, including (Gx 5 and 6), the orders involving defendant Landolfi together with the sealing orders (Gx 74 and 75) and the original reels of tape obtained through the wire-tap permitted by the respective orders.

Judge Griesa granted the motion to suppress "a) the evidence obtained under the wiretap orders because of violation of 8(a)" (Tr. A-8, ll. 6-7), not only for the inordinate delay in presenting the tapes to the issuing judge for judicial sealing, but also for the Government's failure to offer a satisfactory explanation for the delay.

ARGUMENT

I

The District Court properly suppressed the wire tap evidence. Eighteen USC 2518(8)(a) which mandates suppression of tapes in the absence of a judicial seal, provides in part:

"Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his

"direction...The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire communication or evidence denied therefrom..."

Judge Griesa quite properly found that the delay of eleven and ten months, respectively, absent a satisfactory explanation for the delay, warranted suppression following the dissenting opinion in United States v. Falcone* (505 Fed. 2d 478, 1974, 3rd Circ., cert. denied, 95 S. Ct., 1338-1339) holding:

"Respectfully, I am constrained to regard the dissent in Falcone, which I regard as correct, is that Section 8(a) deals specifically with the circumstances under which wiretap can be used or not used as evidence in relation to the judicial sealing requirement. I believe that this specific reference in the statute is directly applicable and is in no way overridden by the more general provisions of Section 10(a)." (Tr. A-6, 11. 10-18)

The Government's contention that Judge Griesa erred when he chose to follow the specific provisions of Section 8(a) "which mandates suppression of tapes in the absence of a judicial seal..." is not supported by the requirements of the statute (Govt's brief, p. 9), Section 8(a) which mandates the sealing of the recordings to protect them

*In Falcone the Government delayed for forty-five days the presentment of tapes for judicial sealing. The delays at bar were eleven months and ten months without plausible explanation.

from editing or other alteration.

Nor is the Government afforded relief under Section 10(a)(iii) which similarly permits the suppression "if not made in conformity with the order of authorization or approval." It is interesting to note that the instant appeal emanates from the right set forth in Section 10(b)(iii) thereby contradicting the Government's argument that the court elected Section 8(a) instead of 10(a).

The decision of the District Court finds support in the New York Court of Appeals (People v. Nicoletti, 34 N.Y. 2d 749, 1974) in a joint trial for conspiracy and promoting gambling (Penal Law, Section 225.05), the very statute upon which the indictment in the instant case is predicated. In Nicoletti, the tapes remained unsealed for thirty-nine days and were apparently safely maintained in a locked foot locker and the Justice who issued the eavesdropping warrant was fully advised of the storage arrangement. Though there was no evidence and no allegation that the tape recordings were altered or doctored in any way, the Court of Appeals (Jason, J.) speaking for a unanimous court, held (p. 253):

"We cannot accept these arguments in justification. The sealing requirement is to be strictly construed and it is not the defendant's burden to come forward with

"evidence of tampering when unsealed recordings are sought to be introduced into evidence. The purpose of the requirement is at least threefold: to prevent tampering, alterations or editing; to aid in establishing the chain of custody; and to protect the confidentiality of the tapes. (See United States v. Poeta, 455 F. 2d 117, 122, cert. den. 406 U. S. 948; United States v. Kohne, 358 F. Supp. 1053, 1058, affd. 485 F. 2d 682; see, also, American Bar Assn., Project on Minimum Standards for Criminal Justice; Standards Relating to Electronic Surveillance, Final Draft [1971], § 2.3, subd. [b]; §§ 4.2, 5.13, 5.14 and Commentary.) Of these, the first is perhaps of greatest concern. Tape-recorded conversations lend themselves to 'diabolical fakery'. (Lopez v. United States, 373 U. S. 427, 468-469 [BRENNAN, J., dissenting]; see, also, Dash, Schwartz and Knowlton, The Eavesdroppers [1959], at p. 368). Through skillful editorial manipulation, alterations may be undetectable, or, if detectable at all, then only by the most sophisticated devices and techniques involving time-consuming and expensive analysis by technical experts. While not foolproof, sealing reduces the risk of such manipulation to tolerable limits.

Measured against the potential for abuse, the explanations offered in this case are patently insufficient. While the parties charged with custody of the tape recordings were cognizant of the sealing requirement, they did not present them to the issuing Justice for sealing as was their duty. That the issuing Justice was advised of the custody arrangements will not suffice. While he may have tacitly approved them, the fact remains that the recordings were not sealed."

The failure to immediately comply with the sealing provision of the eavesdropping order for ten and

eleven months, respectively, is equivalent to no seal. Obviously, under these circumstances the denial of suppression would negate and contravene the objective of Congress in enacting the eavesdropping provisions.

II

The "affirmative steps" (Govt's brief, p. 15) taken by the Government to ensure that similar sealing violations will not occur in the future cannot and does not cure the ills affecting the evidence secured through the wire tap orders under review. The failure to fully comply with the orders and the statutory provisions enacted by Congress to ensure the integrity, identity and contents of tapes after interception and to protect their confidentiality mandates suppression.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ARMENDE LESSER
Attorney for Defendant-
Appellee Vincent Landolfi

State of New York, County of *New York* ss.:

Hannah R. Lesser

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at *175 W 93 St - NYC*

That on the *30* day of *Apr. 1* *Brief* 1976 deponent served the within ~~certificate of compliance on or~~

Barbara S. Ambler *Special Atty*
attorney(s) for *United States* *American*
at *1 St. Andrews Plaza - NY 10007*
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within New York State.

Hannah R. Lesser

Sworn to before me, this *1st* day of *May* 1976

Constance Ferrer
Notary Public

NY Co # 31-7500 300
Com Exp 3/20/1978